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DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-215092 **DATE:** December 31, 1984

MATTER OF: Analytics Incorporated

DIGEST:

1. Protest that agency allowed insufficient time for the preparation of proposals is denied where the time allowed exceeded the statutory minimum.

2. Protest concerning a solicitation's delivery requirement is denied when an in camera review of the agency's justification for the requirement indicates that the requirement was reasonable.

3. Protest that an agency improperly disclosed to the protester's competitors that the protester was a prospective offeror is denied since the regulations do not prohibit such disclosures and the protester apparently was aware of how this might occur and could have taken steps to prevent it.

4. Protest that an agency failed to delete a Patent Indemnity clause incorrectly included in a solicitation is denied where the agency effectively informed offerors that it did not consider the clause to be critical and invited them to address deletion of the clause in their proposals.

Analytics Incorporated protests the provisions of request of proposals (RFP) No. DE-RP01-84-MA32632, issued by the Department of Energy (DOE). The protester also complains that an agency letter to prospective offerors improperly disclosed its interest in this procurement as well as information concerning the firm's ability to compete. We deny the protest.

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The solicitation was for the lease and maintenance of telecommunications equipment, specifically 22 TEMPEST-approved Telecommunications Line Controllers (TLCs) and 3 TEMPEST-approved Satellite Delay Compensation Units (SDCUs), with the option for the lease of up to 64 additional SDCUs. TEMPEST approval is an assurance that a device is secure and free of electronic emissions. One of the TLCs will be used with a teleprinter that is used for communications between DOE and Department of Defense activities. The other 21 will be used in connection with communications via DOE's SACNET system, which routinely carries classified information. Analytics is currently leasing similar equipment to DOE.

The agency issued the solicitation on March 16, 1984, and set April 16 as the closing date for receipt of initial proposals. The solicitation stated that the successful offeror would have to furnish for testing one TLC and three SDCUs no later than 15 days after award of the contract. Testing would be at no cost to the government. The solicitation required delivery of the remaining 21 TLCs on a staggered schedule ranging from 30 to 60 days after acceptance of the test units. The 64 optional SDCUs would be delivered in lots of 3 as directed by the government.

By letter dated March 29, Analytics requested the agency to extend the closing date for receipt of proposals to May 16 and to change the delivery schedule to require delivery of the test units 180 days after award, instead of 15. The agency responded by extending the closing date to April 30 and by changing the date for delivery of the test units from 15 days to 60 days after award. The effect of this latter change was to add 45 days to the delivery schedule for all remaining TLC units. Analytics also wrote to the agency on March 30 requesting clarification of the solicitation in a number of areas. On April 9, the agency reportedly issued a letter to all prospective offerors in which it quoted Analytics' questions and provided responses to each. Finally, the protester wrote the agency on April 20 requesting still further clarification of the solicitation. The agency replied with a letter dated April 25, again quoting Analytics' questions before providing responses. In some of these questions, Analytics had mentioned itself by name.

Analytics did not submit a proposal in response to the RFP. Rather, the firm filed a pre-closing date protest with this Office raising the issues discussed below. DOE submitted its administrative report on the protest in two parts. Part I contains unclassified material and was sent to all interested parties; Part II contains classified material and has been made available only to those in this Office having proper security clearance.

Proposal preparation period

Analytics complains that, even as amended, the solicitation did not allow enough time for offerors to prepare their proposals. The basis for this complaint is that, according to Analytics, the solicitation did not contain sufficient information concerning the equipment that will be used with the TLCs being procured. When the protester raised this issue in its letter of April 20, the agency said that information concerning at least some of this equipment could be obtained from the equipment manufacturers, a task the protester says it could not accomplish within the time allowed for responding to the solicitation. The protester says that only a firm with advance knowledge of this procurement possibly could have prepared an adequate proposal prior to the due date.

The agency's response is that the 45 days allowed in this case for the preparation of proposals satisfied the requirement of the Federal Procurement Regulations (FPR), § 1-1.1003-6(b), as amended by Temporary Regulation 75, October 12, 1983, 48 Fed. Reg. 48,462 (1983), which generally requires an agency to allow at least 30 days response time from the date it issues a solicitation. The agency says it was not possible to extend the closing date further for the reason explained in the classified portion of the administrative report. The agency received only one offer in response to the solicitation.

Traditionally, and unlike in formally advertised procurements, cf. FPR, § 1-2.202-1(c), there was no minimum response time for procurements conducted by negotiation. In 1983, however, congress imposed by statute a minimum 30-day response period for all but a limited number of procurements, both advertised and negotiated.

See 15 U.S.C.A. § 637(e)(2)(B) (West Supp. 1984); see also FPR Temp. Reg. 75, supra. Obviously, the 45-day proposal preparation period allowed in this case exceeded the minimum period required. Consequently, we have no basis to question the agency's action in this regard.

Informational deficiencies

Related to, but distinct from, the protester's complaint concerning the time allowed for the preparation of proposals is the protester's complaint that the solicitation did not contain sufficient information concerning the equipment to be used with the TLC units being procured. The protester also raised this issue in its April 20 letter to the agency in which it complained that if the solicitation required TLC units that would prevent loss of data from equipment other than the TLCs, the solicitation should have contained detailed information on the characteristics of the other equipment.

The agency's response is that the protester's premise is incorrect; that is, the solicitation did not require TLC units that would prevent loss of data in other devices, but only ones that would prevent loss of data between the TLCs and other equipment. The agency adds that the solicitation adequately described the requirements for the TLCs being procured and that it was not necessary for the solicitation to have listed the specifications of the equipment with which the TLCs would be used, particulary since this other equipment was commercially available. Moreover, some of the peripheral equipment had not yet been procured and the agency could only advise, as it did in its letter of April 25, that the word processors it would buy in the future would be required to have the X-on and X-off feature that its existing teletype units have.

A solicitation must contain sufficient information to allow offerors to compete intelligently and on equal terms. McCotter Motors, Inc., B-209986, Aug. 2, 1983, 83-2 CPD ¶ 156. Specifications must be free from ambiguity and must describe the agency's minimum needs accurately. Klein-Sieb Advertising and Public Relations, Inc., B-200399, Sept. 28, 1981, 81-2 CPD ¶ 251. There is no legal requirement,

however, that a competition be based on specifications drafted in such detail as to eliminate completely any risk for the contractor, id., or that the procuring agency remove every uncertainty from the mind of every prospective offeror. Security Assistance Forces & Equipment International, Inc., B-199366, Feb. 6, 1981, 81-1 CPD ¶ 71.

We reviewed the relevant parts of the solicitation, Analytics' pre-closing date letters to the agency, and the agency's response to these letters. We cannot conclude from this review that the solicitation was deficient.

The solicitation stated that the TLC units must be capable of processing narrative traffic in conjunction with "appropriate teletype equipment" and facsimile data traffic in conjunction with the DACOM 412 facsimile transmission device, all without loss of data. As the agency explained in its April 25 letter to prospective offerors, there was no requirement that the TLCs preclude loss of data in this other equipment. The April 25 letter also identified its existing teletype equipment as the ASR 35/ASR 43 word processor and informed offerors that although this equipment eventually would be replaced with as-yet-unidentified equipment, the new equipment would have the X-on and X-off feature. The letter also advised that additional detailed information on the ASR 35/ASR 43 and the DACOM 412 could be obtained from the manufacturer.

In our view, although it might have been possible for the agency to have provided more information concerning the equipment with which the TLC units must operate, the solicitation unambiguously stated what would be required of the TLC units being procured and, in conjunction with the April 25 letter, provided enough information to enable offerors to prepare their proposals. See National Veterans Law Center, B-198738, Feb. 2, 1982, 82-1 CPD ¶ 58; California Computer Products, Inc., B-193329, July 3, 1979, 79-2 CPD ¶ 1. Moreover, we cannot understand how the protester could have been prejudiced by the agency's failure to describe its existing equipment in more detail since, as the current TLC contractor, the protester should be fully familiar with the existing peripheral equipment. Finally, we have no basis to

disagree with the agency's position that it could not provide more information on the word processors it would procure in the future. This aspect of the protest is therefore without merit.

In its comments on the agency's administrative report, Analytics complains that the agency has not addressed the essence of its protest, which it now claims is that the solicitation did not provide a mechanism for determining responsibility for loss of data. In our view, however, this is merely another way of stating the protester's argument that the solicitation did not sufficiently define the characteristics of the equipment to be used with the TLCs. We have concluded that the solicitation was adequate in this respect.

Delivery time

The protester also objects to the solicitation's 60-day delivery requirement, arguing that since the agency is acquiring equipment that will replace existing equipment, there is no genuine need for such a short delivery schedule. The agency responds by contending first that this basis for the protest is untimely, and second, that it is without merit. Analytics disputes the agency's timeliness argument. We need not resolve the dispute concerning timeliness, however, because even assuming that this basis for the protest is timely, it is clearly without merit.

A contracting agency has the primary responsibility for determining its minimum needs and for drafting requirements that reflect those needs. Romar Consultants, Inc., B-206489, Oct. 15, 1982, 82-2 CPD ¶ 339. Although agency's should strive to maximize competition, burdensome requirements that may limit competition are not objectionable provided they reflect the government's legitimate minimum needs. Duroyd Manufacturing Company, B-213046, Dec. 27, 1983, 84-1 CPD ¶ 28. This Office will not question an agency's assessment of its needs unless a protester shows that the agency's determination is clearly unreasonable. Gulf Coast Defense Contractors, Inc., B-212641, Feb. 28, 1984, 84-1 CPD ¶ 243.

In this case, the agency's reasons for refusing to extend the delivery schedule further[1]/ are contained in the classified portion of the administrative report. We recognize that the protester has not had access to this portion of the report and that therefore its ability to challenge the agency's conclusion that a 60-day delivery requirement reflects its minimum needs is somewhat impaired. Nevertheless, we reviewed the classified portion of the administrative report in camera and we conclude that the agency's determination in this regard was reasonable.

Disclosure of protester's interest in the procurement

As indicated earlier, on April 25 the agency issued a letter to all prospective offerors responding to questions raised by Analytics. The letter quoted Analytics' questions and provided responses. Since some of these questions mentioned Analytics by name, the firm claims that it was prejudiced by the agency's improper disclosure of both its interest in this procurement and its apparent inability to deliver in accordance with the solicitation. Analytics claims the agency violated federal regulations and practice.

The agency says that the format used in its April 25 letter was consistent with its standard practice, and adds that it did not intend to prejudice the protester in any way. The agency notes that the protester did not indicate that anything contained in its letter of April 20 was sensitive, nor did it request the agency not to disclose its interest in the procurement. In any event, says the agency, since the protester was the incumbent contractor, other prospective offerors reasonably could assume that the firm had at least some interest in competing for a new contract. Finally, the agency says it is highly unlikely that disclosure of the information contained in Analytics April 20 letter was prejudical to the firm.

1/ The agency in effect extended the delivery schedule 45 days in response to Analytics' March 29 request.

We find no merit to the protester's contention. The regulations only concern the release of information regarding the identity of offerors after the receipt of proposals. See Federal Acquisition Regulation, § 15.413-1; FPR, § 1-3.103. We are not aware of any similar regulation covering the time before the receipt of proposals. In addition, the agency says that the format of its letter of April 25 was exactly the same as its letter of April 9 to all offerors. Thus, Analytics should have known of the agency's practice of quoting questions in its response and, in its letter of April 20, should have either deleted materials it did not want disclosed or requested that the agency do so. It did neither. Although the better practice might have been for the agency to have deleted the protester's name from the questions, we think the liklihood of any prejudice in this case was speculative at best.

Patent Indemnity clause

Finally, the protester objects to the inclusion in the solicitation of a Patent Indemnity clause. The clause states that the contractor must reimburse the government for any liability the government might incur for patent infringement. Both parties agree that the agency improperly included the clause in this solicitation. When Analytics raised this with the agency in its April 20 letter, however, the agency's response on April 25 was that an offeror should address deletion of solicitation clauses in a section of its proposal entitled "Exceptions and Deviations." Analytics objects to this approach, arguing that an offeror should not be required to risk rejection by submitting a nonconforming proposal.

The agency explains that it did not amend the solicitation to delete the Patent Indenmity clause because the clause was not critical. Also for this reason, the agency denies that the protester would have risked rejection of its proposal had it taken exception to the clause.

We think the agency should deleted the Patent Indemnity clause by amendment once the agency was informed that the solicitation improperly had included it.

Nevertheless, we see no merit to the protester's position. In its letter of April 25, the agency in effect informed all offerors that it did not regard the Patent Indemnity clause as critical. In our view, it was not reasonable for Analytics to continue to believe that the agency would reject a proposal that suggested deletion of the clause after the agency effectively invited such suggestions.

Conclusion

Because the protester has not raised any issue that would warrant disturbing this procurement, we deny the protest.

for Milton J. Socolar
Comptroller General
of the United States